TAB 9

2008 CarswellOnt 4392

Miller v. Optimum Insurance Co.

James Miller, Applicant and Optimum Insurance Company Inc., Insurer

Financial Services Commission of Ontario (Arbitration Decision)

D. Leitch Member

Heard: June 6, 2008
Judgment: July 10, 2008
Docket: FSCO A07-000214

Counsel: Ian D. Kirby, for Mr. Miller

Joan Takahashi, for Optimum Insurance Company Inc.

Subject: Insurance

Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits.

Cases considered by *D. Leitch Member*:

B. (A.) v. Royal Insurance Co. of Canada (2000), 2000 CarswellOnt 3573 (F.S.C.O. App.) — considered

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 SCC 39, (sub nom. *Blank v. Canada (Minister of Justice))* 352 N.R. 201, 270 D.L.R. (4th) 257, 51 C.P.R. (4th) 1, (sub nom. *Blank v. Canada (Minister of Justice))* [2006] 2 S.C.R. 319 (S.C.C.) — followed

Browne (Litigation Guardian of) v. Lavery (2002), 37 C.C.L.I. (3d) 86, [2002] O.T.C. 109, 2002 CarswellOnt 496, 18 C.P.C. (5th) 241, 58 O.R. (3d) 49 (Ont. S.C.J.) — considered

Burgess (Litigation Guardian of) v. Wu (2003), 235 D.L.R. (4th) 341, 68 O.R. (3d) 710, 2003 CarswellOnt 4783 (Ont. S.C.J.) — referred to

Conceicao Farms Inc. v. Zeneca Corp. (2006), 82 O.R. (3d) 229, 2006 CarswellOnt 4558, 214 O.A.C. 161, (sub nom. *Horodynsky Farms Inc. v. Zeneca Corp.)* 272 D.L.R. (4th) 532 (Ont. C.A. [In Chambers]) — followed

Conceicao Farms Inc. v. Zeneca Corp. (2006), 2006 CarswellOnt 5672, 215 O.A.C. 233, 32 C.P.C. (6th) 201, (sub nom. *Horodynsky Farms Inc. v. Zeneca Corp.)* 272 D.L.R. (4th) 545, 83 O.R. (3d) 792 (Ont. C.A.) — considered

Conceicao Farms Inc. v. Zeneca Corp. (2007), 233 O.A.C. 396 (note), 2007 CarswellOnt 1357, 2007 CarswellOnt 1358, 367 N.R. 399 (note) (S.C.C.) — referred to

D. (M.) v. Halifax Insurance Co. (2001), 2001 CarswellOnt 5152 (F.S.C.O. App.) — considered

Driver v. Traders General Insurance Co. (2003), 2003 CarswellOnt 6514 (F.S.C.O. App.) — considered

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — considered

Hargraves v. Lombard General Insurance Co. of Canada (2007), 2007 CarswellOnt 1206 (F.S.C.O. Arb.) — considered

Landolfi v. Fargione (2006), 2006 CarswellOnt 1855, 25 C.P.C. (6th) 9, 265 D.L.R. 426, 79 O.R. (3d) 767, 209 O.A.C. 89 (Ont. C.A.) — referred to

Lee v. State Farm Mutual Automobile Insurance Co. (2003), 2003 CarswellOnt 5825 (F.S.C.O. Arb.) — considered

Levey v. Traders General Insurance Co. (1999), 1999 CarswellOnt 5547 (F.S.C.O. App.) — referred to

Lowe v. Guarantee Co. of North America (2005), 25 C.C.L.I. (4th) 165, 2005 CarswellOnt 3072, 20 M.V.R. (5th) 15, 200 O.A.C. 236, 256 D.L.R. (4th) 518, 80 O.R. (3d) 222 (Ont. C.A.) — referred to

Monks v. ING Insurance Co. of Canada (2005), 2005 CarswellOnt 2557, 24 C.C.L.I. (4th) 1 (Ont. S.C.J.) — referred to

Monks v. ING Insurance Co. of Canada (2008), 2008 ONCA 269, 2008 CarswellOnt 2036, [2008] I.L.R. I-4694, 235 O.A.C. 1, 61 C.C.L.I. (4th) 1 (Ont. C.A.) — referred to

R. v. Stone (1999), 1999 CarswellBC 1064, 1999 CarswellBC 1065, 239 N.R. 201, 63 C.R.R. (2d) 43, 123 B.C.A.C. 1, 201 W.A.C. 1, 24 C.R. (5th) 1, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, [1999] 2 S.C.R. 290 (S.C.C.) — followed

Sharma v. Allstate Insurance Co. of Canada (2008), 2008 CarswellOnt 3892 (F.S.C.O. Arb.) — considered

Song v. Hong (2008), 2008 CarswellOnt 1055 (Ont. S.C.J.) — referred to

Villers v. Pilot Insurance Co. (2006), 2006 CarswellOnt 839 (F.S.C.O. App.) — referred to

Windsor (City) v. MFP Financial Services Ltd. (2004), 2004 CarswellOnt 4990, 2 C.P.C. (6th) 228, 247 D.L.R. (4th) 640, 193 O.A.C. 1, 74 O.R. (3d) 58 (Ont. C.A.) — considered

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

s. 7 — referred to

s. 282 — pursuant to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22

s. 15(2) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 31.06(3) — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

s. 33(1.1) [en. O. Reg. 281/03] — considered

s. 52 — considered

***D. Leitch Member*:**

Issues:

1 The Applicant, James Miller, was injured in a motor vehicle accident on January 30, 1999. He applied for and received statutory accident benefits from Optimum Insurance Company Inc. ("Optimum"), payable under the *Schedule*.[FN1] Disputes arose as to whether Mr. Miller was entitled to attendant care benefits at a recommended rate and whether he had sustained a catastrophic impairment as a result of the accident. Both of these disputes were referred to Designated Assessment Centres ("DACs"). The Attendant Care DAC concluded that Mr. Miller was entitled to benefits at the recommended rate and the Catastrophic Impairment DAC concluded that Mr. Miller had sustained a catastrophic impairment as a result of the accident. Optimum challenges those conclusions in this proceeding and at least two of the DAC assessors are expected to testify.

2 The issue at this preliminary issue hearing is:

> 1. If a DAC assessor meets privately with counsel for either party after providing an opinion but before testifying at the hearing, will that fact affect either the admissibility of, or the weight to be assigned to, his/her opinion?

Result:

3

1. The fact that a DAC assessor meets privately with counsel for either party before testifying at the hearing will not, by itself, affect the admissibility of his/her opinion or affect the weight to be assigned to it.

2. If either party obtains previously-undisclosed information from meeting privately with a DAC assessor and intends to present that information at the hearing, that party will comply with Rule 42.2 of the *Dispute Resolution Practice Code* by serving and filing a document setting out the subject matter of the testimony to be presented and the substance of the facts and opinion which the DAC assessor will present.

3. If either party provides new or additional information *of any kind* to a DAC assessor, including the information assumed in a hypothetical question, that party will do so in writing, with copies to me and to the opposing party.

Notice given to the DAC assessors; no submissions received

4 When this issue arose, I heard submissions from the parties as to whether the two DAC assessors who are expected to testify should be put on notice and allowed to make submissions. I concluded that they should be and, after consulting further with the parties, I sent the DAC assessors letters putting them on notice. I informed them the issue would be argued on June 6, 2008 and that either they or their facilities would be permitted to make written or oral submissions. I also asked that they not discuss the issue before then with the parties.

5 Neither the DAC assessors nor their facilities made any submissions.

Optimum's arguments

6 Ms. Takahashi started by reviewing the role of DACs in the dispute resolution system. She referred to several passages of the Court of Appeal's July 2005 decision in *Lowe v. Guarantee Co. of North America*.[FN2] The Court noted that DACs are not chosen by either party and that they are required to remain "independent and free of bias." The following observations about the role of DACs are found at paragraph 39:

> Under the SABS [the *Schedule*], a DAC assessment serves a dual purpose. First, depending on whether either party decides to dispute the DAC opinion, the assessment determines the insured's entitlement to benefits, either permanently or on an interim basis. Second, if (and only if) one of the parties disputes the determination of entitlement, it can serve as expert evidence in the continuing dispute resolution process.

7 Dealing with the issue of whether DACs could be sued, the Court concluded that since DACs were under "a duty to be neutral and free of bias", they should remain open to suit for breaches of that duty.

8 Ms. Takahashi then referred to the February 2007 decision of Arbitrator Muir in *Hargraves v. Lombard General Insurance Co. of Canada* [2007 CarswellOnt 1206 (F.S.C.O. Arb.)] [hereinafter H].[FN3] In addressing the same issue now before me, Arbitrator Muir analysed two documents: General Guideline #4 entitled "Ensuring Neutrality of the Designated Assessment and Centre System", issued in March 1999, and an Information Communiqué, issued in July 1999. Both were issued by the Minister's Committee on the Designated Assessment Centre System.[FN4] Arbitrator Muir concluded that these documents did not specifically address the issue. He wrote: "Does the Guideline or the Communiqué prohibit a DAC from meeting with one party alone? No, it clearly does not. All it expressly requires is that the other party be informed of the meeting with counsel." In addition, Arbitrator Muir recognized that DAC assessors "are normally called to present one or the other parties'

[sic] point of view" and "that it is imperative, indeed the professional responsibility of counsel, to properly prepare witnesses to give evidence." Nevertheless, after referring to the Court of Appeal's decision in *Lowe* and to two appeal decisions criticizing "one-sided contact" with DAC assessors,[FN5] Arbitrator Muir expressed the following opinion:

> ... DAC witnesses, because of the central, neutral and statutory role DACs play in the dispute resolution process must remain neutral, and at least as importantly must *appear* to be neutral. Arbitrators will carefully scrutinize the conduct of a DAC where there is evidence of one-sided partisan contact. To my mind, these considerations, as a matter of policy, trump the concerns raised by Lombard about hearing efficiency and fairness to the witnesses themselves. In short, the unique place of the DAC in the dispute resolution process takes them outside of these considerations, as important as they are. Therefore, I do not believe that it can be said that there is a right to meet with a DAC assessor to discuss their evidence with them for an arbitration hearing, as there might be said to exist for other expert or lay witnesses.

9 Arbitrator Muir then stated that, in any event, he had no jurisdiction to tell DAC assessors how to conduct themselves when approached by counsel:

> In addition to these considerations it seems to me that I have little or no jurisdiction to tell the DAC to do anything in this regard. As I have indicated, I do not think that the Guidelines specifically address the issue and the 1999 Communiqué appears to contemplate such meetings occurring. Ultimately it is within the discretion of a DAC to best assess whether it will speak to anyone prior to a hearing or trial, subject to the requirements of the SABS and Guidelines that have been issued from time to time.

10 In a footnote to this passage, Arbitrator Muir explained further:

> As I read the decision of the Director's Delegate [in *Villiers and Pilot Insurance Company*, cited at footnote 5 of this decision] there is no jurisdiction over the DAC, supervision is exercised over the party relying upon the DAC, normally the insurance company. In this forum any failure of the DAC to comply with its responsibilities will be visited on the party relying upon the DAC's opinions.

11 Accordingly, Arbitrator Muir denied Lombard's motion requesting an order confirming its right to speak to the DAC assessors before they testified. He also denied Lombard's request for an order confirming its right to refuse to divulge the details of its pre-hearing discussions with the DAC assessors. On the contrary, he stated that "in the event that there was a one-sided meeting with a DAC assessor, an Order requiring the production of a written record of the substance of that conversation might be appropriate." At the same time, however, Arbitrator Muir recognized the benefit of allowing the parties to ask DAC assessors supplementary questions before testifying at the hearing. He concluded his decision with the following observations and suggestions:

> What contact with the parties might be acceptable in preparation for the hearing? I appreciate Lombard's point that while a DAC witness is confined to their initial findings and their report when examined in chief, on cross-examination they will often be called upon to comment on material at variance with their conclusions. Clearly a pre-trial meeting with both counsel present would be acceptable. Alternatively, written interlocutories copied to counsel might be an acceptable alternative. Both of these approaches would allow some preparation of the expert witness without raising issues of perceived or actual compromise of neutrality.

12 Ms. Takahashi relied on Arbitrator Muir's decision and agreed that his suggestions constituted acceptable al-

ternatives to one-sided communications with the DAC assessors. However, she did not agree that a written record or a recollection "of the substance" of such communications would be sufficient. These, she argued, might miss something or might fail to capture "nonverbal communications." Ms. Takahashi also did not agree that Guideline #4 was silent on the issue. She pointed to the following language: "If the matter is not resolved after the DAC assessment, and the matter continues to arbitration or court, the DAC assessor may have to testify. This assessor must remain and appear to remain neutral." She maintained that this language implies a prohibition on any one-sided contact with DAC assessors prior to a hearing.

Mr. Miller's arguments

13 In response, Mr. Kirby agreed with Arbitrator Muir that there is no language in the Guideline prohibiting a DAC assessor who has already authored a report from speaking privately with counsel for either party prior to the hearing. Mr. Kirby did not specifically deny that such communications might compromise the DAC's neutrality but instead denied that neutrality, or its appearance, remains a legitimate concern after it becomes clear the DAC's opinion favours one party and will be contested by the other party at the hearing. He acknowledged that DAC assessors might refuse to meet privately with counsel and he agreed that a FSCO arbitrator would have no jurisdiction to require them to do so. However, he acknowledged only that a *treating* physician or health professional is prohibited from responding to enquiries from a lawyer unless ordered to do so or the patient consents. [FN6] He maintained that there was otherwise "no property in a witness" and no rule prohibiting him from speaking privately with the DAC assessors prior to the hearing. Consistent with this position, Mr. Kirby did not divulge what he intends to discuss with the DAC assessors.

14 Mr. Kirby acknowledged that the Guideline allows the parties to supply new or additional information to DACs. It states: "If there is new information and the parties agree that the review of the *new* material may alter the DAC's opinion, then a new DAC assessment should be arranged, rather than one party requesting an 'updated' report from the DAC." (Emphasis in the original). Since Mr. Kirby drew attention to this language, it might be inferred that he does not intend to present new information to the DAC assessors. However, Mr. Kirby also remarked that since the DACs no longer exist, they would no longer be able to provide addendums to their reports in any event.

15 Accordingly, I did not understand Mr. Kirby to acknowledge any restrictions on what he could discuss privately with the DAC assessors. But nor did I understand him to suggest any restrictions on what Ms. Takahashi could discuss privately with the DAC assessors. It follows that the kind of "privacy" he seeks would not prevent Ms. Takahashi from subsequently asking the DAC assessors what they had discussed "privately" with him or their answering such questions.

Analysis

16 During the course of argument, I asked counsel whether solicitor-client privilege was a relevant consideration. In addition, as explained further below, Arbitrator Muir's decision in *H* at least mentioned litigation privilege. Nevertheless, counsel raised no privilege issues. In my view, the propriety of one-sided, post-report, pretrial communications with DAC assessors can only be determined by taking into consideration both the DACs' role and certain privilege issues.

Litigation privilege

17 In its 2006 decision in the case of *Blank v. Canada (Department of Justice)*[FN7], the Supreme Court of

Canada explained the difference between solicitor-client privilege and litigation privilege. On behalf of the majority, Justice Fish wrote:

> ¶ 24 ... the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, [cases omitted]. In an oft-quoted passage, Major J., speaking for the Court, stated in McClure that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).
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> ¶ 25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.
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> ¶ 26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.
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> ¶ 27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.
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> ¶ 28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:
>
> > It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
> >
> > Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to al-

> low clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)
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> R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Law in Transition: Evidence, [1984] Special Lect. L.S.U.C. 163, at pp. 164-65.

¶ 29 With the exception of *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129, a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege: [cases omitted]

¶ 30 American and English authorities are to the same effect: [cases omitted] In the United States communications with third parties and other materials prepared in anticipation of litigation are covered by the similar "attorney work product" doctrine. This "distinct rationale" theory is also supported by the majority of academics: [references omitted].

¶ 31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.

¶ 32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a "zone" or "chamber" of privacy. Another important distinction leads to the same conclusion. Confidentiality, the *sine qua non* of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

18 As I read these paragraphs, litigation privilege continues to exist and protects a party's or a counsel's right to meet privately with any potential third party witness who agrees to meet with him or her on that basis.[FN8] However, litigation privilege does not oblige any potential third party witness to participate in such a meeting before a hearing and some are unlikely to do so.

19 For example, if the potential third party witness is an expert retained for purposes of litigation by the opposing party, that expert will probably refuse to participate in any such meeting, at least not without the specific approval of the party that retained him/her. This is because litigation privilege also protects the right of each party to consult an expert without disclosing either its communications with the expert or the expert's opinion unless it intends to rely on his/her opinion at the hearing. But litigation privilege only specifically protects *a party's* right to refuse to disclose to the opposing party an expert opinion that it does not intend to rely upon. *The expert*, or anyone provided with his/her opinion, is, therefore, often required by the party who retained him/her to give an undertaking not to disclose or discuss his/her opinion. The acceptability of this practice was recently confirmed by the Ontario Court of Appeal's 2004 decision in *Windsor (City) v. MFP Financial Services Ltd.*[FN9] At para-

graph 14 of that decision, Justice Sharpe stated that the appellants would have "had an iron-clad claim of litigation privilege" in respect of an expert report they had obtained in preparation for litigation and that, accordingly, "they could have refused to produce it to their adversaries in the litigation" if they did not intend to rely upon it. But the appellants had also sent a copy of the report to a non-party. Justice Sharpe held that this person's obligation to maintain confidentiality over the report did not arise from litigation privilege but from his contractual undertaking to the appellants not to disclose or discuss its contents.

20 In this case, while it is clear that the DAC assessors are experts, they were not retained by either party and there was no suggestion that they have provided either party with an undertaking not to discuss their opinions with the other party. Furthermore, I agree that I have no jurisdiction to require the DAC assessors to participate in private meetings with parties or their counsel prior to the hearing. Nor, in my view, can I determine or declare that they have no right to participate in such meetings, as Arbitrator Muir appeared to do in *H.* As I see it, the scope of my jurisdiction is similar to the scope of litigation privilege: while neither can control whether such meetings take place, both can create consequences if such meetings do take place. In particular, I have the jurisdiction to determine the effect, if any, of such meetings on the admissibility of, or the weight to be assigned to, the DAC assessors' opinions. For its part, litigation privilege gives the party or the counsel that does meet with a third party witness the right to refuse to disclose to the opposing party any information obtained; that information forms part of the lawyer's "work product." It follows that the party or lawyer who seeks to meet with such a witness has the right to at least ask that the meeting take place in private. Litigation privilege does not require the witness to agree to such a meeting nor shield him/her from later being asked what was discussed.

21 However, as explained further below, the scope of litigation privilege can be restricted by a court's or a tribunal's rules of procedure. In this case, Rule 42.2 of the *Dispute Resolution Practice Code, 4th edition*, (the "*Code*") applies and requires the party relying on any information or opinion obtained from an expert, including a DAC assessor,

> ... to serve and file a document setting out the following:
>
> (b) the subject matter of the testimony to be presented; and
>
> (c) the substance of the facts and opinion which the witness will present.

22 Still, this Rule does not require the disclosure of *all* the information obtained from the DAC assessor; it only requires the disclosure of the facts and opinion which the party intends to rely upon at the hearing. The Rule cannot, therefore, be read as taking away the party's or a lawyer's right to ask the DAC assessor to meet in private. That right, in my view, remains protected by litigation privilege.

23 I cannot, of course, ignore the reality that a party or counsel may, in fact, do more in a private meeting with an expert than simply *obtain* information; he or she may, in fact, also *provide* information to the expert. An expert witness typically learns significant facts about the case from the parties or from documents provided by the parties and then uses that information to formulate his/her opinion. That information is frequently central to the cross-examination of the expert by the party opposite at the hearing. A certain tension has, therefore, developed between litigation privilege and pre-trial disclosure of the information provided to experts. Since the modern trend is towards pre-trial disclosure of this information, the scope of litigation privilege has narrowed. This has been legally possible because, as Justice Carthy pointed out in the 1999 case of *General Accident Assurance Co. v. Chrusz*:

> ... there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: see *Hickman v. Taylor*, 329 U.S. 495(1946).
>
> The "zone of privacy" is an attractive description but does not define the outer reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.[FN10] [p. 331]

24 The Supreme Court of Canada's decision in *Blank* recognized and accepted this trend. At paragraph 61, the Court observed: "While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process."

25 This trend has not, however, obliterated litigation privilege. A few days after the Supreme Court's decision in *Blank*, the Ontario Court of Appeal released a decision in a case called *Conceicao Farms Inc. v. Zeneca Corp.* [FN11] The Court held that the trend in the direction of complete discovery "does not yet extend as far as is tentatively suggested in *Browne (Litigation Guardian of) v. Lavery*."[FN12] In *Browne*, Justice Ferguson had stated at paragraph 66: "It is my tentative view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial."

26 But while not "yet" willing to go that far, the Court of Appeal agreed that Rule 31.06(3) of the *Rules of Civil Procedure*, the rule requiring the "disclosure of the findings, opinions and conclusions of an expert", "clearly encompasses not only the expert's opinion but the facts on which the opinion is based" and "the instructions upon which the expert proceeded." Accordingly, but for its timing, the Court would have agreed with the order of Court of Appeal Justice Gillese, in Chambers, requiring disclosure of the "foundational information" contained in a lawyer's memorandum detailing a discussion she had with an expert who ultimately testified on the client's behalf. At the same time, the Court held that the memorandum itself was protected by litigation privilege, and hence did not have to be produced to the other side, because it "was prepared by counsel as part of defending the lawsuit." The Court drew the following distinction:

> ¶ 21 Taking as a given that a document protected by litigation privilege and part of counsel's work product contains the foundation for an expert opinion, there is no need to remove the privilege for the document itself to do justice. The foundational information in the document is available under rule 31.06(3), if it is sought on discovery. Removing the privilege for the document itself is not necessary to obtain that information, but does run the risk of requiring disclosure of *properly privileged information that is often intertwined with discoverable information in the lawyer's work product.*
>
> (My emphasis)

Solicitor-client privilege

27 During the course of argument, I tried to explain to counsel why I wondered whether solicitor-client privilege might also be a relevant consideration. To that end, I posited the following scenario, entirely hypothetical. In a recent interview to prepare his client to give evidence at the hearing, Mr. Kirby learned for the first time that Mr. Miller took up bowling a few years after the accident and continues to bowl. Ms. Takahashi has obtained a wealth of documentary productions and has perhaps even examined Mr. Miller under oath[FN13] but has never discovered this fact. It appears from their reports that the DAC assessors were also unaware of this fact at the time of their assessments. Mr. Kirby is concerned that this fact may come to light during the hearing. He wants to meet privately with the DAC assessors before they testify, in part to determine whether this fact, if known, might change their opinions. However, Mr. Kirby does not intend to "inform" the DAC assessors that his client took up bowling after the accident; he intends to ask them to assume this fact and then ask them whether this assumed fact would alter the opinions in their reports.

28 Expressed in the language of the Court of Appeal in *Conceicao*, does this scenario provide an example of how "properly privileged information" can become "intertwined with discoverable information in the lawyer's work product"? Put differently, does the information Mr. Kirby obtained from Mr. Miller through solicitor-client communications remain "properly privileged information" once shared with the DAC assessors, even if only shared through hypothetical questions?

29 As already indicated, I accept that litigation privilege protects a party's or a counsel's right to meet privately with any potential third party witness who agrees to meet with him or her on that basis. However, I do not accept that such a meeting, by itself, creates an exclusive or confidential relationship between counsel and the witness. As confirmed in *Windsor (City) v. MFP Financial Services Ltd.*, that kind of relationship can be created when an expert, or a person who receives a copy of the expert's report, is asked to give an undertaking not to discuss or disclose the expert's report. There may be other kinds of witnesses who can give parties undertakings of confidentiality[FN14] but, in my view, our system of justice is better served if potential third party witnesses are allowed to tell the truth, as they see it, whether to one party, in private, or to both parties, and whether before the hearing or at the hearing. As stated by the Supreme Court in *Blank*, "lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality."

30 Returning to my scenario, it follows that despite the "private" nature of Mr. Kirby's meeting with the DAC assessors and Mr. Kirby's right to refuse to disclose to Ms. Takahashi any information he obtained but does not intend to rely upon at the hearing, Ms. Takahashi could meet with them later the same day to ask them what they had discussed with Mr. Kirby. As previously mentioned, Mr. Kirby did not suggest anything different during argument. This means that, as a practical matter, Mr. Kirby cannot ask the DAC assessors his hypothetical question about bowling without running the risk that the underlying information, which he might otherwise argue was protected by solicitor-client privilege, will be disclosed, directly or indirectly, to Ms. Takahashi.

31 In legal terms, I think Mr. Kirby's hypothetical question, once put to the DAC assessors, would amount to a waiver of solicitor-client privilege in the underlying information, at least for purposes of the hearing. I base this view on the Supreme Court of Canada's comments made in its 1999 decision in *R. v. Stone* [1999 CarswellBC 1064 (S.C.C.)]. These comments were made in a criminal case but, as Justice Gillese stated at paragraph 34 of her decision in *Conceicao Farms Inc. v. Zeneca Corp.*, "there is nothing to suggest that they are limited to such proceedings." In *Stone*, the expert's report contained information that would otherwise have been subject to solicitor-client privilege. The Court observed at paragraph 98:

> It is true that Dr. Janke's report included not only his diagnosis, but a recital of the facts as provided by the

appellant and which formed the basis of his expert opinion. It was through disclosure of the report, for example, that the Crown learned that the accused, contrary to his initial trial testimony, appeared to have some recall of the beginning of the fatal assault by way of a dream.

32 Nevertheless, the Court held that solicitor-client privilege had been waived by defence counsel's reference to the report in his opening address. The Court added these important comments at paragraphs 98 and 99:

> It was not open to the appellant to pick and choose the portions of an expert report to be put before the trier of fact.
>
> [O]nce a witness takes the stand, he/she can no longer be characterized as offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately.

33 Of course, we are not talking here about the DAC assessors' reports. We are talking about post-report communications between counsel and DAC assessors which might, or might not, cause them to change their opinions as expressed in their reports. Still, in my view, solicitor-client privilege should not prevent disclosure, to both the trier of fact and to the opposing party, of any information disclosed to a DAC assessor. I agree with Justice Ferguson's rejection of the pre-*Stone* cases as explained at paragraphs 33 and 34 of his decision in *Browne*:

> [33] The *Stone* decision also puts in doubt the decision in *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193, 19 C.P.C. (3d) 200 (Gen. Div.). In that case, the court ruled that when an expert is called as a witness there is not an automatic waiver of the expert's entire file but only of the facts and assumptions provided to the expert by counsel and then only if those formed the basis of the expert's opinion. Loukidelis J. laid out the following four principles in terms of waiver of privilege [at p. 201 O.R.]:
>
> > (1) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence.
> >
> > (2) The privilege can be waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert.
> >
> > (3) Whether there is a privilege or not can be ascertained by one of two ways. As in *Ocean Falls*, supra, the judge can examine the documents or materials for which privilege is claimed. Another way is for counsel, through cross-examination of the expert, to determine whether all or part of the file is privileged.
> >
> > (4) As a general rule, if facts are supplied that are not found in other evidence or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.
>
> [34] With great respect, I do not think it is possible to apply these principles. I am reminded of the point of [Templeman] L.J. in *Great Atlantic Insurance Co.* How can the judge know what was or was not relied on or was influential without simply relying on what the expert might say? How can counsel explore the issue if the answers to the questions might disclose privileged information? The application of these principles

would simply delegate the task to the person whose opinion, and perhaps integrity, is under scrutiny. And it would prevent opposing counsel from making any submissions.

Privilege and pre-hearing disclosure are also important in proceedings before this tribunal

34 Before leaving this part of the decision, I want to explain why issues of privilege and pre-hearing disclosure are also important in proceedings before this tribunal.

35 Where privilege is concerned, this tribunal is bound by section 15(2) of the *Statutory Powers Procedure Act* , R.S.O., 1990, c. S.22, and is, therefore, prohibited from admitting into evidence anything "that would be inadmissible in a court by reason of any privilege under the law of evidence." At paragraph 24 of *Blank*, the Supreme Court said that "solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law" and "must be as close to absolute as possible to ensure public confidence and retain relevance." At paragraph 27, it said that litigation privilege is intended "to ensure the efficacy of the adversarial process." In my view, both privileges are recognized by section 15(2) of the *Statutory Powers Procedure Act.*

36 Where pre-hearing disclosure of information provided to an expert is concerned, the *Code* obviously does not contemplate the same discovery process as exists in the courts. However, as already noted, Rule 42.2(c) of the *Code* stipulates that an expert's report must set out "the substance of the facts and opinions which the witness will present" prior to the hearing. In *B. (A.) v. Royal Insurance Co. of Canada* [2000 CarswellOnt 3573 (F.S.C.O. App.)], Director's Delegate Naylor referred to the identical predecessor of this rule and then stated: "Fairness, and the Commission's rules, requires disclosure of the principal elements of the facts and opinion to be presented."[FN15] In *Lee v. State Farm Mutual Automobile Insurance Co.* [2003 CarswellOnt 5825 (F.S.C.O. Arb.)], Arbitrator Sapin said: "When an expert is asked to testify about specific matters, the opposing party is entitled to notice of the substance of the expert's testimony in order to have the opportunity to prepare an effective cross-examination. This fundamental principle informs all of the early disclosure rules that underlie the entire arbitration process at the Financial Services Commission."[FN16]

Privilege vs. DAC neutrality

37 In *H*, Arbitrator Muir acknowledged that "the evidence of a DAC assessor, notwithstanding its unique place in the process, is assessed not unlike any other expert witness called by the parties." In addition, as already noted, he recognized that DAC assessors "are normally called to present one or the other parties' [sic] point of view" and "that it is imperative, indeed the professional responsibility of counsel, to properly prepare witnesses to give evidence." He was nevertheless concerned that "[o]ne-sided contact [with DAC assessors] will inevitably lead to questions which must be answered, sidetracking the hearing and potentially fatally damaging the evidence of the DAC." He concluded that counsel had "no right as such to speak privately to a DAC" because "as a matter of policy", DAC assessors must remain neutral. Having reached this conclusion, he reasoned that there could be "no right to the 'protected space' that lay at the heart of the rationale for litigation privilege." I cannot agree with this analysis for a number of reasons.

38 First, Arbitrator Muir did not identify the source of any "policy" prohibiting counsel from meeting privately with DAC assessors. On the contrary, he stated: "I do not think that the Guidelines specifically address the issue and the 1999 Communiqué appears to contemplate such meetings occurring." I acknowledge Ms. Takahashi's argument that such a "policy" is implied in the part of the Guideline that states that if the DAC assessor has to testify, he or she "must remain and appear to remain neutral." However, I do not accept that my decision should be governed or guided more by the *implication* of a *Guideline* issued by a Minister's committee with no mandate

to re-write the rules of litigation than by a recent decision of the Supreme Court of Canada re-affirming the existence of litigation privilege.

39 Second, I do not accept that only DAC assessors have an obligation to be neutral. I agree with Justice Gillese who stated at paragraph 41 of her decision in *Conceicao Farms Inc. v. Zeneca Corp.* [2006 CarswellOnt 4558 (Ont. C.A. [In Chambers])]:[FN17]

> Expert opinion tendered by a party is a unique type of evidence. Although generally retained by one side to the litigation or the other, experts are expected to be neutral. Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides. Their status as experts derives, in significant measure, from the assumption that they will offer the court objective opinions on which the court is entitled to rely.

40 Of course, even coming from an Appeal Court Justice, this view might be regarded as somewhat naïve; it could be argued that experts chosen by the parties are bound to be less objective than DAC assessors who are not. But it must not be forgotten that in both cases, we are talking about experts who have already written reports expressing opinions in favour of one or the other party. I understand why it may be important to prohibit one-sided communications with DAC assessors *before* they issue their reports. As David Draper, then Director of Arbitrations, wrote in *D. (M.) v. Halifax Insurance Co.* [2001 CarswellOnt 5152 (F.S.C.O. App.)]: "[t]heir function is to take the dispute out of the back-and-forth of competing partisan reports by providing an impartial assessment."[FN18] The appearance of neutrality up to this point may facilitate the acceptance of the DAC assessor's opinion by both parties. But once the DAC assessor's opinion has been issued and the "losing" party decides to challenge it, neither party is likely to continue to perceive that assessor as "neutral." Again, as Arbitrator Muir said, DAC assessors "are normally called to present one or the other parties' [sic] point of view."

41 Third, I do not share Arbitrator Muir's concern that "[o]ne-sided contact [with DAC assessors] will inevitably lead to questions which must be answered, sidetracking the hearing and potentially fatally damaging the evidence of the DAC." I acknowledge that DAC assessors who meet privately with either counsel may face questions from the other counsel about what was discussed and that such questions might even be pursued at the hearing. However, in my view, those questions would be entirely proper and the answers obtained might be extremely important. In any event, the goal should not be to protect the DAC assessor's evidence from being damaged by probing questions. Once the litigation process has been triggered, the parties are not entitled to expect that process to be governed by anything other than the normal rules of litigation.

42 Likewise, however the parties may view the matter, I would not agree that an arbitrator should make assumptions or findings about the neutrality of a DAC assessor merely because he/she met privately with counsel for one or both of the parties prior to the hearing. In addition to my conclusion that such a meeting is protected by litigation privilege, the impartiality or neutrality of DAC assessors should, like that of all experts, be determined on the totality of their evidence. Again, as Arbitrator Muir observed: "a DAC assessor, notwithstanding its unique place in the process, is assessed not unlike other expert witness called by the parties." In *Driver v. Traders General Insurance Co.* [2003 CarswellOnt 6514 (F.S.C.O. App.)], Director's Delegate Makepeace observed: "[l]ike all expert reports, the DAC report is assessed as to its accuracy, completeness, relevance, expertise and impartiality."[FN19] This approach should also apply to any oral evidence given by experts at the hearing, even if some of them, including DAC assessors, have met with counsel before the hearing. In my view, unless a private, pre-hearing meeting with a DAC assessor can be linked to some other reason to question his/her neutrality, such a meeting should not, by itself, affect either the admissibility of, or the weight to be assigned to,

his/her evidence and opinion.

43 Finally, I want to comment on Arbitrator Wilson's decision, issued after argument in this case, in *Sharma v. Allstate Insurance Co. of Canada* [2008 CarswellOnt 3892 (F.S.C.O. Arb.)]. Arbitrator Wilson wrote:

> It is trite law that, as an arbitrator working in an alternative, legislatively derived system, I am bound by the decisions of the superior courts (section 96 courts) which have a supervisory function over all administrative tribunals in Ontario. In the absence of competing, contradictory jurisprudence from the superior courts, an arbitrator should at the very least be guided by the jurisprudence emanating from the superior courts of the province.
>
> In 2005 with the release of Lalonde J.'s decision in *Monks*, there was convincing jurisprudence at the superior court level supporting the proposition that parties should not offend the neutrality of DAC assessors by providing supplementary documents or interviewing them privately as preparation for testimony in an arbitration.[FN20]

44 I certainly acknowledge that judicial control over the decisions of this tribunal is exercised by Superior Court judges sitting as members of the Divisional Court. I also agree that, if relevant, FSCO arbitrators should always give careful consideration to decisions of individual judges sitting in the Superior Court. However, so far as I am aware, there is no authority for the proposition that FSCO arbitrators are bound by such decisions.

45 Turning to the decision in *Monks v. ING Insurance Co. of Canada*,[FN21] Justice Lalonde did find that the DAC assessor in that case had breached Guideline #4 and failed to maintain his neutrality. However, in making this finding at paragraph 1233 of his decision, Justice Lalonde relied specifically on the fact that the DAC assessor had, at the insurer's behest and without the insured's knowledge, addressed a causation issue in his report and read new reports after his assessment. In other words, Justice Lalonde did not question the DAC assessor's neutrality only because he had met privately with insurer's counsel prior to trial. Nor did Justice Lalonde, or the Court of Appeal in affirming his decision,[FN22] address the question of whether such a meeting could be protected by litigation privilege.

Conclusion

46 In my view, the fact that a DAC assessor meets privately with counsel for either party before testifying at the hearing will not, by itself, affect the admissibility of his/her opinion or affect the weight to be assigned to it. As I see it, litigation privilege protects a party's or a counsel's right to seek out such meetings. It does not require DAC assessors to participate and it does not shield them from questions about what was discussed. If such meetings do take place, this fact, by itself, should not result in any adverse finding in relation to the DAC assessor's neutrality.

47 At the same time, in order to ensure compliance with the *Code* and to address the tension between privilege and the disclosure of information to any expert, I make the following additional orders:

> 1. If either party obtains previously-undisclosed information from meeting privately with a DAC assessor and intends to present that information at the hearing, that party will comply with Rule 42.2 of the *Dispute Resolution Practice Code* by serving and filing a document setting out the subject matter of the testimony to be presented and the substance of the facts and opinion which the DAC assessor will present.

2. If either party provides new or additional information *of any kind* to a DAC assessor, including the information assumed in a hypothetical question, that party will do so in writing, with copies to me and to the opposing party.

Expenses:

48 The expenses incurred in this preliminary issue hearing will be in the cause.

***D. Leitch Member*:**

49 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The fact that a DAC assessor meets privately with counsel for either party before testifying at the hearing will not, by itself, affect the admissibility of his/her opinion or affect the weight to be assigned to it.

2. If either party obtains previously-undisclosed information from meeting privately with a DAC assessor and intends to present that information at the hearing, that party will comply with Rule 42.2 of the *Dispute Resolution Practice Code* by serving and filing a document setting out the subject matter of the testimony to be presented and the substance of the facts and opinion which the DAC assessor will present.

3. If either party provides new or additional information *of any kind* to a DAC assessor, including the information assumed in a hypothetical question, it will do so in writing, with copies to me and to the opposing party.

FN1 *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

FN2 (2005), 80 O.R. (3d) 222 (Ont. C.A.).

FN3 (FSCO A06-000209, February 12, 2007).

FN4 The Minister's Committee on Designated Assessment Centres System was created under the authority of section 7 of the *Insurance Act* and section 52 of the *Schedule.*

FN5 *Villers v. Pilot Insurance Co.* [2006 CarswellOnt 839 (F.S.C.O. App.)] Appeal (FSCO P05-00010, January 30, 2006) and *Levey v. Traders General Insurance Co.* [1999 CarswellOnt 5547 (F.S.C.O. App.)], Appeal (FSCO P98-00035, February 25, 1999). The *Levey* decision was also referred to in the Information Communiqué.

FN6 Mr. Kirby referred to the decision of Justice Moore in *Song v. Hong* [2008 CarswellOnt 1055 (Ont. S.C.J.)], 2008 CanLII 7752. For the reader's sake, I note that paragraph 45 of that decision is misleading: Justice Ferguson's decision in *Burgess (Litigation Guardian of) v. Wu* [2003 CarswellOnt 4783 (Ont. S.C.J.)], 2003 Can LII 6385dealt with a doctor who had been a treating physician before agreeing to act as an expert witness for the defence against his own patient.

FN7 2006 SCC 39 (S.C.C.)

FN8 Ms. Takahashi suggested that the Law Society of Upper Canada's *Rules of Professional Conduct* might prohibit counsel from meeting with certain third party witnesses. Rule 4.03 of those Rules states: "Subject to the rules on communication with a represented party set out in subrules 6.03(7), (8) and (9), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way."

FN9 (2004), 74 O.R. (3d) 58 (Ont. C.A.).

FN10 (1999), 45 O.R. (3d) 321 (Ont. C.A.).

FN11 (2006), 32 C.P.C. (6th) 201, 272 D.L.R. (4th) 545 (Ont. C.A.); leave to appeal refused (2007), [2006] S.C.C.A. No. 451 (S.C.C.). The Court of Appeal received and considered the Supreme Court's decision in *Blank*.

FN12 [*Browne (Litigation Guardian of) v. Lavery*] (2002), 58 O.R. (3d) 49 (Ont. S.C.J.).

FN13 In accordance with section 33(1.1) of the *Schedule*.

FN14 For example, third party witnesses who conduct surveillance of parties: see *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (Ont. C.A.).

FN15 Appeal (FSCO P99-00049, September 18, 2000).

FN16 (FSCO A03-000181, November 27, 2003).

FN17 2006 CanLII 24345, July 26, 2007.

FN18 Appeal (FSCO P00-00049, May 16, 2001).

FN19 Appeal (FSCO P03-00006, November 18, 2003).

FN20 (FSCO A07-001223, June 18, 2008).

FN21 [2005] O.J. No. 2526 (Ont. S.C.J.).

FN22 [2008] O.J. No. 1371 (Ont. C.A.).

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